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Expert Electric, Inc. and Local 3, International Brotherhood of Electrical Workers, AFL-CIO. Case 29-CA-28100

February 18, 2010

ORDER DENYING PETITION TO REVOKE SUBPOENA

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This matter is before the Board¹ pursuant to the Employer's petition to revoke investigatory subpoena ad testificandum A-819744, which was served on the Employer and its counsel by counsel for the Contempt Litigation and Compliance Branch on November 17, 2009. On November 24, 2009, the Employer filed a timely petition to revoke the subpoena.

The Employer argues, inter alia, that the subpoena is facially invalid because the Board, absent a three-member quorum: (1) lacks authority to act, (2) cannot delegate its authority to its Executive Secretary to issue subpoenas, and (3) cannot delegate its authority to the General Counsel to initiate contempt proceedings. We find no merit in these procedural arguments.

The Board's delegation of its powers to a threemember group is irrelevant to a determination of whether the Board has the authority to issue subpoenas when comprised of two members. Section 11(1) of the Act provides that "[t]he Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application." (Emphasis added). Thus, the plain language of the Act specifically authorizes the issuance of the subpoena here.

Further, the Employer's argument that the subpoena should be revoked because it was issued under the direction of the Board's Executive Secretary, similarly fails. Section 102.31 (a) of the Board's Rules and Regulations provides that "[t]he Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof." (Emphasis added). This subsection of the Board's Rules was amended on March 5, 1997. See 62 FR 9930.

Finally, the Employer's argument that the Board's 2007 delegation of litigation authority to the General Counsel was no longer valid at the time the Board became comprised of two members is also without merit. Section 3(d) of the Act grants the General Counsel "final authority, on behalf of the Board," with respect to investigative functions. The subpoena was issued as part of an investigation into possible contempt proceedings, not the initiation or prosecution of such proceedings. Board's "exclusive authority to institute contempt proceedings for violations of its orders . . . makes it in effect a prosecutor, obliged like other prosecutors to use its investigatory powers before instituting a judicial proceeding" NLRB v. Interstate Material Corporation, 930 F.2d 4, 6 (7th Cir. 1991), citing NLRB v. Steinerfilm, Inc., 702 F.2d 14, 15 (1st Cir. 1983). Accordingly, we find that the issuance of the subpoena was entirely proper and the Petitioner has failed to raise a meritorious procedural basis for revoking it.

In addition, we find that the subpoena seeks information relevant to the matters under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Employer has failed to establish any other legal basis for revoking the subpoena. See generally, *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996). Accordingly, the petition is denied.

Dated, Washington, D.C. February 18, 2010

Wilma B. Liebman,	Chairm

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Teamsters Local 523 v. NLRB, 590 F.3d 849 (10th Cir. 2009); Narricot Industries, L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).